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IN THE

Supreme Court of the United States

No. 73-541

BARRY BAILEY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

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On Petition for a Writ of *Certiorari* to
The United States Court of Appeals for
The District of Columbia Circuit

REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

Respondent's brief in opposition to the petition for *certiorari* failed to address itself head-on to the crucial constitutional issue raised by petitioner; to wit,

> whether the Petitioner's conviction – which was based on trial evidence comprising "resemblance testimony" placing him at points remote from the scene of the crime, when not a single trial

witness or other evidence put him at the scene of the crime – was constitutionally proper.

Respondent skirts this vital issue by distorting and manipulating the trial evidence, and it is only for this reason that this Reply is necessary.

* * *

Trial Identification Witnesses

The government's brief mixed pre-trial evidence with trial evidence in an attempt to dispel Petitioner's contention that:

(a) not a single *trial* witness placed petitioner in the bank or outside the bank,[1] and

(b) the 4 witnesses, who testified that Petitioner resembled someone at the bus stop or at the car switch scene, failed to identify Petitioner in any way at the corporeal line-up or from the photo of said line-up.

The government argues that Miss Smith identified Petitioner from the photos taken in the bank during the robbery

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[1] The government incorrectly asserts that Howard Issacs "*saw* petitioner fleeing from the bank." (Respondent brief, p. 8). The record shows Issacs *found a resemblance* between petitioner and the fleeing robber (Tr. 447). However, this testimony must be rejected since Issacs also said petitioner had "a black leather jacket and wore a ski mask" (Tr. 450, 453). The black jacket was worn by one of the other robbers alleged to be the co-defendant, and since the fleeing robber wore a ski mask Issacs could not see his face to make an identification; hence, the vague "resemblance". Issacs made no identification of any kind at the corporeal line-up and did not view the photographic array. Hence, he was a surprise witness for the government.

and from hearing his voice in the background during a phone call made to her by the co-defendant. (Gov. Brief, p. 5, 8).

The government failed to tell the Court, that Miss Smith hardly knew Petitioner and that she only saw Petitioner very briefly a couple of times during the 6 months prior to the robbery. On these occasions Petitioner did not talk to her, except to say "hi" as he went out the door of his apartment, where she was going to visit Petitioner's wife's new baby. (Tr. 89, 90). Her own testimony destroyed any credibility to the alleged voice identification.

We submit that the film taken in the bank during the robbery and the selected stills therefrom admitted in evidence were extremely fuzzy and distorted. Further, the person alleged to be Petitioner wore a peaked-cap pulled down to his eyes and a turtleneck sweater pulled up over his nose, and the only views of this person were mostly from the side or three-quarters to the rear.[2] We defy government counsel, or anyone else, to recognize even his own father in these photos in view of the disguise and the poor quality of the photos. Hence, Smith's testimony has absolutely no convictable merit, and this counsel finds it incredible that the government offers it as such.

One last point regarding Miss Smith. The government asserts that Petitioner and co-defendant borrowed her car that morning (Gov. Brief, p. 3). The record is unequivocal

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[2] The government suggests that none of the 26 people in the bank during the robbery, and who viewed the photo array and/or attended the corporeal line-up and/or saw the photo thereof, were unable to make any identification whatsoever because of the disguise. Yet, it has the temerity to advocate that Smith, who was not in bank, could make an identification from the bank photos.

that the co-defendant borrowed the car and that she had no conversation with Petitioner (Tr. 71, 73).

The government asserts that Parker, while unable to identify Petitioner *in court* or from the line-up photo *in court*, nevertheless prior to trial said to an FBI agent that Petitioner bore a resemblance to someone he saw outside the bank, but he could not say that this person entered the bank. The simple reply is, that this pre-trial statement was not before the jury and does not bear on Petitioner's contention that there was no trial evidence which placed him at the scene of the bank, resemblance or otherwise.

The government asserts that "[I]t is not surprising that there were few positive identifications . . ." referring to Wilford, Smith and Diggs. (Government Brief, p. 7, fn. 5). The fact is there were no positive -- or even resemblance – identifications placing Petitioner at the scene of the crime, and only a single, suspicious identification (by Wilford) placing Petitioner at a corner by a gas station more than a block from the bank and over a half hour before the robbery. The Smith identification was physically impossible and borders on perjury, *supra*. And, Diggs did not make an in court identification.

Regarding the pre-arrest photo array (see Petitioner's exhibit A 4, 5, Appendix to the Petition), the only thing common to the 7 photos comprising the array is that all the photos are of black men. Petitioner (A 4, 5, photo E) is the only person with a heavy mustache and a medium-length, afro hairstyle. These features emphasized him in the array, and, of course if one of the robbers had such features, Petitioner's photo would "resemble" that robber.

* * *

Thus, the petition survives the attack made in the government's brief, and the issue of "whether a defendant can be convicted solely on resemblance testimony" survives.

CONCLUSION

The respondents' own brief demonstrates the extent and substantiality of the questions presented by this case. The petition for *certiorari* should be granted.

Respectfully submitted,

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